2000

The State of Utah, Division of Wildlife Resources and Department of Natural Resources v. Huntington-Cleveland Irrigation Company : Reply Brief

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael M. Quealy; Norman K. Johnson; Martin B. Bushman; Assistant Attorneys General; Jan Graham; Attorney General; Attorneys for Appellant.
J. Craig Smith; David B. Hartvigsen; Brian C. Cheney; Nielsen and Senior; Attorneys for Appellee.

IN THE UTAH SUPREME COURT

No. 20000413-SC
Priority No. 15

THE STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES,

Appellant,

v.

HUNTINGTON-CLEVELAND IRRIGATION COMPANY,
a Utah non-profit corporation,

Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from a Judgment of the Seventh Judicial District Court for Emery County
Honorable Bruce K. Halliday

J. CRAIG SMITH, No. 4143
DAVID B. HARTVIGSEN, No. 5390
BRIAN C. CHENEY, No. 8881
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
SALT LAKE CITY UT 84111

ATTORNEYS FOR APPELLEE
HUNTINGTON-CLEVELAND
IRRIGATION COMPANY

MICHAEL M. QUEALY, No. 2667
NORMAN K. JOHNSON, No. 3816
MARTIN B. BUSHMAN, No. 5594
Assistant Attorneys General
JAN GRAHAM, No. 1231
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
SALT LAKE CITY UT 84116

ATTORNEYS FOR APPELLANT
STATE OF UTAH

IN THE UTAH SUPREME COURT

No. 20000413-SC
Priority No. 15

THE STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES,

Appellant,

v.

HUNTINGTON-CLEVELAND IRRIGATION COMPANY,
a Utah non-profit corporation,

Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from a Judgment of the Seventh Judicial District Court for Emery County
Honorable Bruce K. Halliday

J. CRAIG SMITH, No. 4143
DAVID B. HARTVIGSEN, No. 5390
BRIAN C. CHENEY, No. 8881
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
SALT LAKE CITY UT 84111

ATTORNEYS FOR APPELLEE
HUNTINGTON-CLEVELAND
IRRIGATION COMPANY

MICHAEL M. QUEALY, No. 2667
NORMAN K. JOHNSON, No. 3816
MARTIN B. BUSHMAN, No. 5594
Assistant Attorneys General
JAN GRAHAM, No. 1231
UTAH ATTORNEY GENERAL
1594 West North Temple, #300
SALT LAKE CITY UT 84116

ATTORNEYS FOR APPELLANT
STATE OF UTAH

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. HUNTINGTON-CLEVELAND MISSTATES AND/OR MISREPRESENTS SEVERAL IMPORTANT FACTS 1

II. HUNTINGTON-CLEVELAND CONTINUES TO MISCHARACTERIZE THE NATURE OF DWR'S LAWSUIT 6

III. DWR HAS CONSISTENTLY PLEADED AND ARGUED THAT HCIC'S MODIFICATION OF CORPORATE DOCUMENTS AND ITS IMPLEMENTATION OF THOSE DOCUMENTS–SPECIFICALLY IN 1999–WAS AND IS ILLEGAL 8

IV. MUTUAL IRRIGATION COMPANY ANNUAL STOCK ASSESSMENTS ARE "CHARGES" AS UTAH CODE ANN. § 78-12-25(1) USES THE TERM.. 14

V. DWR COULD NOT HAVE CHALLENGED HCIC'S ACTIONS UNTIL DWR RECEIVED ITS FIRST ASSESSMENT UNDER THE 1995 BY-LAWS 16

VI. DWR'S THIRD CAUSE OF ACTION IS NOT BARRED BY UTAH CODE ANN. § 78-12-26(4) 19

VII. A NEW CAUSE OF ACTION AROSE IN 1999 WHEN HCIC RECLASSIFIED ALL OF DWR'S SHARES AS MUNICIPAL AND INDUSTRIAL SHARES, AND DWR ALLEGED THIS CAUSE OF ACTION IN ITS COMPLAINT 21

VIII. DWR'S POSITION ON THE MERITS OF THIS CASE IS STRONG, BUT THE MERITS ARE NOT CURRENTLY BEFORE THE COURT 24

CONCLUSION 25

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES CITED:

Aurora Credit Services v. Liberty West Dev., Inc., 970 P.2d 1273 (Utah 1998) 17, 18

Badger v. Brooklyn Canal Co., 922 P.2d 745 (Utah 1996) 24

Becton Dickinson & Co. v. Reese, 668 P.2d 1254 (Utah 1983) 18

East Jordan Irrigation Co. v. Morgan, 860 P.2d 310 (Utah 1993) 24

Fishbaugh v. Utah Power & Light, 969 P.2d 403 (Utah 1998) 9

Gill v. Timm, 720 P.2d 1352 (Utah 1986) 9

Platt v. Town of Torrey, 949 P.2d 325 (Utah 1997) 25

Prows v. State, 822 P.2d 764 (Utah 1991) 1

United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880 (Utah 1993) . . 17, 18

Workman v. Brighton, Inc., 1999 UT 30, 976 P.2d 1209 . . . . 22, 23

STATUTES CITED:

Utah Code Ann. § 16-4-24 (1995) 19

Utah Code Ann. § 78-12-25(1) (1996) 15

Utah Code Ann. § 78-12-25(3) (1996) 21

Utah Code Ann. § 78-12-26(4) (1996) 15, 19, 21

Utah Code Ann. §§ 78-33-1, -2, -3, -5, and -12 (1996) 8

IN THE UTAH SUPREME COURT

THE STATE OF UTAH, by and through its DEPARTMENT OF NATURAL RESOURCES, DIVISION OF WILDLIFE RESOURCES,	)	
Appellant,	)	No. 20000413-SC
v.	)	Priority No. 15
HUNTINGTON-CLEVELAND IRRIGATION COMPANY, a Utah non-profit corporation,	)	
Appellee.	)	

REPLY BRIEF OF APPELLANT

ARGUMENT

I. HUNTINGTON-CLEVELAND MISSTATES AND/OR MISREPRESENTS SEVERAL IMPORTANT FACTS

In considering the appropriateness of the Motion to Dismiss granted by the trial court, Appellee Huntington-Cleveland Irrigation Company (HCIC) must take the facts as Appellant Utah Division of Wildlife Resources (DWR) pleads them. A Motion to Dismiss is appropriate only where it "clearly appears that the plaintiff or plaintiffs . . . would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." *Prows v. State*, 822 P.2d 764, 766 (Utah 1991; citations omitted). Yet, Appellee's brief misrepresents several important facts, adds facts that are not in the record, and mischaracterizes DWR's action.

For example, under "Nature of the Case" Appellee asserts that DWR brought this suit "seeking to invalidate historic amendments to its Articles of Incorporation which allowed for different voting rights and unequal assessments for classes of shareholders" (Brief of Appellee at 1). This is correct, so far as it goes. But DWR's First Amended Complaint (hereafter "Complaint") also seeks a declaration that, even if the documents were appropriately modified, their provisions have been inappropriately applied to DWR's stock shares. The difference, not at all subtle, goes to the heart of the matter before this Court. DWR's Complaint is not confined to an attempt to "invalidate" HCIC's corporate documents–it also challenges the implementation and applications of those documents.

HCIC's mischaracterization of DWR's action continues in the "Course of Proceedings" section of its brief where HCIC says: "DWR filed a complaint . . . that challenged the legality of amendments to [HCIC]'s Articles of Incorporation made in 1987 and adoption of Bylaws in January of 1995" (Brief of Appellee at 1). Again, this is correct, but it fails to mention that DWR's suit also challenges HCIC's treatment of DWR under the amendments and, more specifically, the characterization of DWR's water use under those amendments, the resulting assessment of DWR's stock shares, and the denial of DWR's voting rights.

In the section entitled "Background Facts," which is not confined to the allegations in the Complaint, HCIC makes several self-serving statements concerning the history of both the 1977 and 1987 changes to HCIC's corporate documents. Besides being unclear and unsupported by the Record, these allegations fail to mention that initially DWR was not ***in any way*** impacted by these changes. Before they were made, DWR irrigated and was treated like other irrigators. While the changes were being made, DWR irrigated and was treated like other irrigators. After the changes were made, DWR irrigated and was treated like other irrigators. It was not until 1995, when the Bylaws were modified, that anything changed for DWR–and the changes occurred gradually from 1995 to 1999.

In another portion of the "Background Facts" section, HCIC asserts that DWR "had actual knowledge in February of 1995 that a portion of its shares ***had been reclassified*** as M&I stock" that would be "subject to the longstanding voting right restrictions and higher assessments associated with such M&I stock" (Brief of Appellee at 6; emphasis supplied). HCIC goes on to assert that–after DWR protested–HCIC asked DWR to "self-evaluate" how its irrigation comported with the Bylaw definition change. Finally, HCIC asserts "[i]n 1999, [HCIC] determined after extensive discussions with DWR, that DWR did not meet the pecuniary gain requirement in the definition of 'irrigation use' and . . . classified all 4,530 [DWR] shares as M&I stock." *Id.* at 7.

This version of the facts is not based upon allegations in DWR's Complaint and is false. DWR's Complaint at ¶ 40 alleges that at the 1995 shareholder meeting DWR representatives were "informed that they could no longer vote their non-agricultural shares at Company meetings for the election of Company officers. After [they] protested, they were told they could vote only if their vote did not influence an election's outcome." This paragraph simply alleges that those who attended the meeting were notified that a Bylaws change had occurred and, in DWR's case, that it had the potential to impact DWR shares. There is no allegation concerning reclassification of shares. At best the allegation demonstrates uncertainty about reclassification by the time of the 1995 meeting, given that DWR was told initially it could not vote, but was later allowed to do so. At worst, it shows HCIC's intention to discriminate against DWR because, even though the reclassification had not yet occurred, DWR's voting rights were immediately questioned. At any rate, HCIC admits in its brief that "[i]n February, 1995, at the annual shareholder meeting, DWR was notified that some of its shares ***would be reclassified*** as 'M&I' . . . and that such shares would be subject to the voting restrictions and higher assessments" (Brief of Appellee at 29; emphasis supplied), and that it was "in late 1995" when HCIC began assessing some of DWR's stock as M&I stock (Brief of Appellee at 6). Reclassification of DWR's shares did not take place until DWR received that assessment.

HCIC's succeeding allegation–that after the initial classification of DWR's shares DWR was asked to "self evaluate" its share use in light of the 1995 Bylaw definition of irrigation to determine what portion of its irrigation met the definition–is absolutely false and completely misrepresents DWR's Complaint. DWR was never asked to conduct such an evaluation (if it had been, and if its self-determination had been respected, this suit would not have been filed) because DWR has always maintained that it is an irrigator and that none of its shares should be considered M&I shares. The Complaint alleges, for example, that "[n]one of the water delivered under DWR's HCIC stock is used for municipal or industrial purposes" (Complaint at ¶ 29) and "***from the initial receipt*** of an assessment containing '[M&I]' charges and prohibiting DWR from exercising full voting rights, DWR protested . . . and attempted to negotiate resolution based upon its assertion that HCIC's arbitrary and discriminatory practices concerning assessments and voting rights were unfounded and illegal" (Complaint at ¶ 41; emphasis supplied). DWR also specifically alleges that HCIC, not DWR, determined which of DWR's shares did or did not qualify for irrigation assessment, and that the number has varied since 1995 (Complaint at ¶ 46).

HCIC also states, "There are a number of . . . shareholders whose stock has been classified as M&I . . . and who have been paying the higher . . . stock assessment . . . for decades" (Brief of Appellee at 8). The implication is that DWR is the only one of several similarly-situated shareholders to complain. But, the only other shareholders that apparently pay the M&I assessment are "a utility company and several municipalities" (R. 250). Presumably, assuming there is justification to charge M&I shareholders more than other shareholders, it would be municipalities and a power company that should pay the M&I rate.

The most surprising representation in Appellee's "Background Facts" is based upon its own calculation of DWR's water use. Appellee states:

> Thus, the maximum amount of water that [DWR] can . . . beneficially use[] for traditional irrigation purposes is 1,774 acre feet (443 acres x 4 acre-feet per acre) if the acreage alleged in the Complaint is used (i.e., 93 acres at the Emery Game Farm and 350 acres at the Desert Lakes [sic] WMA). ***Under that scenario, and assuming that DWR usage meets the pecuniary gain requirement, all of DWR's stock would be classifiable as Irrigation stock, and this action would be moot.***

(Brief of Appellee at 8; emphasis supplied). HCIC then repeats its mistaken assertion that such could not be the case because of the irrigated acreage "reported by DWR to Huntington-Cleveland in 1996." *Id.* The self-evaluation HCIC claims DWR made never took place, and DWR's Complaint does not allege it. Especially damning to Appellee, DWR specifically alleges that the use of water delivered under HCIC shares to the Emery Game Farm and the Deseret Lake Wildlife Management Area ***is*** for irrigation purposes for pecuniary gain (Complaint at ¶¶ 11-13, 23-24). DWR specifically asked the trial court to declare:

> DWR's water use to be an irrigation use, not subject to "[M&I]" assessment, and not subject to voting restrictions.
>
> In the alterative, this Court should view DWR's use of HCIC water to propagate wildlife hunted by DWR licensees, generating revenue upon which DWR depends, as irrigation with a pecuniary motive. This Court could declare that DWR's use of water is the "irrigation of crops for the purposes of pecuniary gain" under HCIC's Bylaws and not subject to "[M&I]" assessment or voting restrictions.

(Complaint at ¶¶ 63, 64). Thus, as HCIC suggests, this action should be moot because DWR's water uses meet the HCIC definition of "irrigation."

II. HUNTINGTON-CLEVELAND CONTINUES TO MISCHARACTERIZE THE NATURE OF DWR'S LAWSUIT

In its brief, HCIC continues to mischaracterize (or misunderstand) DWR's First Amended Complaint–just as the trial court did. This is done as though, by repetition, Appellee might change the Complaint into something other than what it is and confuse this Court into believing the Complaint questions only the modification of HCIC's corporate documents. DWR's Complaint, however, says what it says. It was purposefully drawn broadly to question the arbitrary and illegal 1977, 1987, and 1995 changes to the HCIC Articles of Incorporation and Bylaws ***and*** the annual, targeted, and discriminatory application of those changes to DWR's stock shares after 1995. The Complaint seeks different types of relief in the alternative (declaratory, injunctive, damages, *etc.*) as the Court deems necessary to assure DWR is treated fairly–specifically that DWR is treated like other irrigators. DWR pleads its water usage meets the Bylaw pecuniary gain definition and asks the Court to so declare (Complaint at ¶ 63). These allegations must be assumed to be true. Because they deal with ongoing, recurring, and future Bylaw implementation, no statute of limitations could have run with respect to them.

Further, the trial court held:

> [DWR's] first amended complaint's claims are so broad and the reasonable inferences to be drawn therefrom so great, that if the Court is in error as to the applicability of the statutes of limitation herein, the plaintiffs should be allowed to flesh out their claims.

(Memorandum Decision at 1; R. 262). Thus, the trial court specifically determined that DWR's claims state a cause of action, but for its erroneous statute-of-limitations ruling. Now HCIC asserts DWR's Complaint fails to state a claim for which a trial court could grant the requested relief. But, it is too late for HCIC to make this claim. If HCIC chose to question the trial court's finding that DWR's Complaint did state a cause of action but for the statute-of-limitations questions, HCIC should have cross-appealed the trial court's decision. By failing to do so, HCIC accepted the determination for purposes of this appeal, and cannot raise that issue now.

Also, this Court should remember that DWR's Complaint contains two causes of action for declaratory relief. The Utah Declaratory Judgment Act provides that:

> 1. The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final . . . decree.

> 2. Any person [broadly defined] . . . whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relationships thereunder.
>
> 3. A contract may be construed . . . before or after . . . a breach.
>
> 5. The enumeration [in sections 2 and 3] does not limit or restrict the exercise of the general powers conferred [in section 1] in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.
>
> 12. This Chapter is . . . to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and it is to be liberally construed and administered."

Utah Code Ann. §§ 78-33-1, -2, -3, -5, and -12 (1996). These provisions are important as background because the law with respect to DWR's causes of action for declaratory relief should be liberally construed and administered.

III. DWR HAS CONSISTENTLY PLEADED AND ARGUED THAT HCIC'S MODIFICATION OF CORPORATE DOCUMENTS AND ITS IMPLEMENTATION OF THOSE DOCUMENTS–SPECIFICALLY IN 1999–WAS AND IS ILLEGAL

The guts of HCIC's brief is that DWR, in its appeal, has "attempt[ed] to argue a new, unpled theory–*i.e.*, that [HCIC]'s alleged wrongful conduct was not the amendments to the Articles or adoption of the Bylaws, but instead was the annual assessments of shareholders" (Brief of Appellee at 13).[1] This is particularly true, HCIC asserts, with respect to DWR's argument that reclassification of all DWR's shares as [M&I shares] in 1999 "created a separate and distinct cause of action which accrued just months before DWR filed its First

---

[1] HCIC repeats some derivation of this argument throughout its brief (*see* Brief of Appellee at 1, 7, 9, 11, 13, 15, 16, 19, 20, 22, 25-36).

Amended Complaint" (*Id.* at 26).[2] HCIC's allegation that DWR did not plead this cause of action in its Complaint is false–DWR pleaded it in its Complaint, covered it in its brief on HCIC's Motion to Dismiss below, and mentioned it in oral arguments before the trial court.

A response to HCIC's mistaken assertion should be considered against the backdrop of Utah's notice pleading law. This Court has held:

> [U]nder Utah's liberal notice pleading requirements, all that is required is that the pleadings "be sufficient to give 'fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.'" *Gill v. Timm*, 720 P.2d 1352, 1353 (Utah 1986).

Fishbaugh v. Utah Power & Light, 969 P.2d 403, 406 (Utah 1998).

HCIC asserts DWR's Complaint fails to allege that HCIC's assessment of DWR's shares was illegal. Yet, the Complaint (referring to 1995-1999) says DWR "was prevented from exercising full voting rights, while being required to pay . . . '[M&I]' ***assessments***" (Complaint at ¶ 41; emphasis supplied). And that, "[f]rom time to time, HCIC representatives have threatened to cut off water delivery to DWR ***if it did not pay its full assessments*** at the higher '[M&I]' rates" (*Id.* at ¶ 42; emphasis supplied). This alleges harm DWR suffered from

---

[2] But HCIC cannot seem to get straight whether or not DWR questioned the legality of the assessment process in its Complaint. On p. 26, HCIC makes the just-quoted statement. On p. 20, HCIC says: "Indeed, DWR is not only seeking to recover alleged 'illegal' assessments, but is also seeking to reestablish voting rights which are also defined according to the use of water . . . . DWR attempts to 'sneak' these claims in behind a claim for reimbursement of 'illegal' assessments. However, DWR has no legal entitlement to the alleged 'illegal' assessments unless and until a court of law determines that they are in fact illegal. Such a determination of illegality is barred by section 78-12-25(1)" (Brief of Appellee at 20 n.10). HCIC cannot have it both ways. Of course, as explained herein, DWR's Complaint contains several assertions that the assessment process was erroneous, improper, and illegal.

the assessment process. The Complaint also describes the scenario by which HCIC determined which of DWR's shares would be subject to the M&I surcharge (*Id.* at ¶ 46). It then alleges HCIC determined in 1999 that "none of DWR's water use qualified as 'irrigation use'" (*Id.* at ¶ 47). It indicates that DWR paid the M&I portion of the 1995-1998 assessments under protest (*Id.* at ¶ 48), and that, when the Complaint was filed, DWR had paid the 1999 assessment "less the '[M&I]' portion of that ***assessment***" (*Id.*; emphasis supplied).[3] The Complaint also asserts that in collecting assessments:

> HCIC continues to discriminate against DWR as an HCIC shareholder ***and indeed has 'stepped up' the discrimination by requiring '[M&I]' assessments on all of DWR's shares*** and by denying DWR any voice in the election of Company officials, notwithstanding that all DWR use of HCIC water is for beneficial irrigation purposes, not for [M&I] purposes.

(Complaint at ¶ 50; emphasis supplied).

The Complaint's First Cause of Action says, "***[a]ssessments*** on stock shares of a mutual non-profit water company must equitably reflect water delivery costs. In DWR's case, the higher '[M&I]' ***assessment*** does not reasonably, or 'equitably,' reflect any increased costs of water delivery" (Complaint at ¶ 56; emphasis supplied). DWR also alleges it costs no more for HCIC to deliver water to DWR under its HCIC shares than to other irrigators (*Id.* at ¶¶10, 21). DWR further asserts:

> By artificially defining some of DWR's irrigation for wildlife propagation as a '[M&I]' water use, [HCIC] has singled out DWR, a minority shareholder, for illegal, inequitable, and discriminatory treatment. This court should

[3] Since the Complaint was filed, DWR has paid the M&I portion of the 1999 assessment and the entire 2000 assessment–under protest.

> declare that the HCIC actions are an arbitrary and capricious violation of DWR's property rights and its rights as an HCIC shareholder."

(Complaint at ¶ 59). Obviously, the reference to "defining some of DWR's irrigation . . . as a '[M&I]' water use" pertains to the assessment process. The First Cause of Action also requests "th[e] Court . . . [to] declare the 1987 change to the Articles of Incorporation and the 1995 Bylaw modification void ***to the extent they require assessment of DWR's HCIC stock shares as used for '[M&I]' purposes*** and deny DWR its full voting rights in the Company" (Complaint at ¶ 60; emphasis supplied).

DWR's Second Cause of Action, for "Declaratory Relief," reasserts that all DWR use of water is for irrigation, and requests the Court to "declare DWR's water use to be an irrigation use, not subject to '[M&I]' ***assessment,*** and not subject to voting restrictions" (Complaint at ¶ 63; emphasis supplied). Such a declaration may or may not involve a finding that the 1995 Bylaw definition of irrigation, for example, was inappropriate or illegal, *per se*. DWR also requested that the "[C]ourt should view DWR's use of HCIC water to propagate wildlife hunted by DWR licensees, generating revenue upon which DWR depends, as irrigation with a pecuniary motive" (*Id.* at ¶ 64). In the alternative, the Complaint requests the Court to declare "that DWR's use of water is the 'irrigation of crops for the purpose of pecuniary gain' under HCIC's Bylaws and not subject to '[M&I]' ***assessment*** or voting restrictions" (*Id.*; emphasis supplied). In other words, if the Bylaw definition survives scrutiny, the Court should declare that DWR's use of water for the beneficial irrigation of crops for pecuniary gain fits within the Bylaw definition.

HCIC arbitrarily determined that DWR's use of water did not comply with the Bylaw definition several times–including once just weeks before the Complaint was filed. HCIC ultimately determined that ***none*** of DWR's irrigation met the definition (after previously finding that ***much*** of DWR's irrigation met the definition). How could any statute of limitations possibly have run with respect to this claim, when the alleged harm occurred just weeks before the Complaint was filed? DWR's alternative request for declaratory relief is, in effect, to declare that DWR's irrigation meets the Bylaw definition–at least to the same extent as other irrigators. What could be more clear in terms of a request for relief seeking to remedy recent, recurring harm from an illegal assessment process?

In its Fifth Cause of Action, labeled "Injunctive Relief," DWR asserts that the modifications of HCIC's corporate documents were illegal and alleges that:

> In the past, HCIC threatened to cut off DWR's water if the improper '[M&I]' ***assessments*** were not paid. DWR has refused to pay the illegal 1999 '[M&I]' ***assessment*** on its HCIC shares. Based on past experience, DWR faces the immediate threat of irreparable harm from having water delivery to its irrigated lands cut off for failure to pay ***the illegal assessment.***

(Complaint at ¶ 82; emphasis supplied). DWR then requests from the Court an injunction

> requiring HCIC to deliver to DWR its irrigation water for the 1999 irrigation season based on DWR's payment of its 1999 ***assessment***, without paying the '[M&I]' portion of the ***assessment***. Further, the injunction should prohibit HCIC from taking any action against DWR, such as selling DWR's HCIC stock shares, as a result of DWR's failure to pay the illegal '[M&I]' ***assessment.***

(*Id.* at ¶ 83; emphasis supplied). DWR also requests the Court to "enjoin HCIC from taking further improper actions to discriminate against minority shareholders, specifically DWR, with respect to fundamental shareholder rights, such as voting . . . and ***establishing unjust assessments***" (*Id.*; emphasis supplied).

The notion that DWR's First Amended Complaint did not seek redress of the harm caused by the assessment process–particularly the 1999 assessment–is ludicrous. DWR's Complaint pleads: (1) HCIC's 1995-1999 assessments of DWR's stock shares were inappropriate and illegal; (2) each such assessment gave rise to a separate cause of action for which damages are sought; and (3) no statute of limitations could have run with respect to any assessment because each occurred within four years before DWR filed its suit.

In its Response to HCIC's Motion to Dismiss, DWR said:

> DWR adds a note of caution here with respect to its compliance with the HCIC Bylaw definition, which it has pled in the alternative (*see* First Amended Complaint ¶¶ 12, 13, 23, 24, 60, 64; Prayer for Relief ¶ 3). DWR believes it meets the definition; and that there is as much "pecuniary gain" in its irrigation as there is in the irrigation of many of its neighbors who hold HCIC stock. However, DWR believes the issues raised in its Complaint run much deeper than whether DWR irrigates for pecuniary gain. There are important policy implications if HCIC is allowed to proceed with its discriminatory actions because the HCIC Articles of Incorporation and Bylaw changes are illegal. As they apply to DWR they are arbitrary and capricious, confiscatory and without any reasonable basis. Thus, while there is little question HCIC has failed to address DWR's factual allegations that it irrigates for pecuniary gain, this should not be the sole focus of future proceedings in this case. Rather, the impact of implementation of the 1995 Bylaws with respect to DWR should receive equal focus.

(Response to Motion to Dismiss at 12; R. 244).

In oral argument on the Motion, the following interchange occurred:

> **THE COURT**: The point that you make relative to a statute of limitations for declaratory relief on the third, fourth and fifth categories, are you saying there is a separate and distinct statute of limitations for declaratory relief versus tortuous action . . . and/or improper corporate action . . . ?

> **MR. JOHNSON**: Let me see if I can put it another way and try to answer your question . . . . What I'm saying with respect to declaratory relief is that our main objective is to prevent the harm. The harm is so recent that no statute of limitations could have run to prevent us from acting to keep the harm from occurring in the future.
>
> I'm not sure how we got the point of misunderstanding in our pleadings that somehow [it appears] our only interest is to modify the bylaws and/or the articles of incorporation, because we tried to make clear in our complaint that that could be a possible outcome, and certainly that could be what the Court would might decide to do.
>
> But another possible outcome is to leave the articles and the bylaws just the way they are and simply not have them apply to the Division of Wildlife Resources because it's an irrigator, and in this regard the harm then clearly is being required to pay the assessment . . . which is nearly twice as much as we would pay if we weren't being assessed as M&I users and not being able to vote.

(R. 282: 42-43).

In sum, DWR's Complaint pleaded that implementation of the modified HCIC corporate documents created causes of action and DWR contended as much in both written and oral arguments to the trial court. In response, the court held:

> [DWR's] first amended complaint's claims are so broad and the reasonable inferences to be drawn therefrom so great, that if the Court is in error as to the applicability of the statutes of limitations herein, the plaintiffs should be allowed to flesh out their claims.

(Memorandum Decision at 1; R. 262).

IV. MUTUAL IRRIGATION COMPANY ANNUAL STOCK ASSESSMENTS ARE "CHARGES" AS UTAH CODE ANN. § 78-12-25(1) USES THE TERM

DWR has consistently pleaded and argued that modification of the HCIC corporate documents in 1977, 1987, and 1995 created causes of action for DWR against HCIC as did annual implementation of the changes contained in those documents from 1995 through 1999 (and, indeed, to the present time). HCIC denies this and asserts that even if it is the case two statutes of limitations, Utah Code Ann. §§ 78-12-25(1) and 78-12-26(4), prohibit DWR from pursuing its claims. Utah Code Ann. § 78-12-25(1) says:

> An action may be brought within four years:
>
> (1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received[.]

Utah Code Ann. § 78-12-25(1) (1996). HCIC asserts this statute applies to DWR's action–except that the last twelve words should be ignored because, despite the statute's wording and grammar, they apply only to "open accounts." One searches HCIC's brief in vain for a legal or logical basis for this conclusion.

DWR's challenge to HCIC's implementation of its corporate documents is not a "new, unpled theory." In our primary brief, we cite case law holding that when a contract is implemented over a period of time, each inappropriate charge or payment creates a new cause of action. Here, each inappropriate assessment created a new cause of action. It may be that Utah Code Ann. § 78-12-25(1) (1996) "cuts off" the number of years a shareholder challenging illegal assessments can go "back in time" to recover overpayments. No such "cut off" applies in this instance, however, because–as HCIC admits–HCIC requested payment of all assessments in question within the four-year period before DWR filed its suit and since DWR's Complaint requests declaratory and injunctive relief to prevent future harm.

V. DWR COULD NOT HAVE CHALLENGED HCIC'S ACTIONS UNTIL DWR RECEIVED ITS FIRST ASSESSMENT UNDER THE 1995 BY-LAWS

DWR could not have challenged the 1995 HCIC Bylaw changes until after they were applied to DWR's stock shares because the nature of the harm caused DWR could not have been known until HCIC reclassified DWR's shares using the new Bylaw definition. As HCIC admits, the term "M&I" in the HCIC Bylaws "does not refer to '[M&I]' as commonly understood" (Brief of Appellee at 27 n.17). Any challenge DWR may have attempted to make before the reclassification would not have been ripe for judicial resolution.

In this regard, HCIC's brief is internally inconsistent–just as its treatment of DWR has been inconsistent. In some places HCIC asserts reclassification of DWR's shares occurred for voting purposes before or during the February 1995 shareholder meeting. For example, HCIC says:

> DWR had actual knowledge in February of 1995 that a portion of its shares ***had been reclassified*** as M&I stock and that DWR would thereafter be subject to the longstanding voting right restrictions and higher assessments associated with such M&I stock.

(Brief of Appellee at 6; emphasis supplied). Later, however, HCIC says:

> In February, 1995, at the annual stockholder meeting, DWR was notified that some of its shares ***would be reclassified*** as "[M&I]" as the terms had been more clearly defined and that such shares would be subject to the voting restrictions and higher assessments.

(Brief of Appellee at 29; emphasis supplied). And HCIC admits: "***[HCIC] began assessing a portion of DWR's stock as M&I stock in late 1995*** in accordance with the definition in the new Bylaws" (Brief of Appellee at 6). The first quote, indicating DWR's shares had been reclassified by the February 1995 meeting, does not reflect DWR's Complaint and is false.[4] The second two statements are correct and reflect the facts in DWR's Complaint. DWR was informed at the 1995 shareholder meeting that a Bylaw change had occurred which had the potential to impact DWR's shares. The initial reclassification took place in "late 1995" when DWR received its first assessment under the new Bylaws.

HCIC cites *Aurora Credit Services v. Liberty West Dev., Inc.*, 970 P.2d 1273 (Utah 1998), and *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993), for the proposition that when a shareholder challenges the validity of a corporate act, the statute of limitations begins to run when the plaintiff has sufficient information to be put on notice to inquire further if there are questions about the corporation's conduct. Neither *Aurora Credit* nor *United Park City Mines* are of any help to HCIC in this case, however. Their facts are distinguishable from the instant matter and their holdings inapplicable. First, both involve situations where plaintiffs maintained there were questions about their knowledge of when certain events occurred, along with allegations that defendants made efforts to conceal important facts. Neither is the case here. DWR admits it had tacit knowledge of HCIC's Bylaw change at the February 1995 shareholder meeting. It also admits it understood the change had the potential to impact DWR's voting of its HCIC shares. But DWR has always maintained that it is an irrigator and the change did not impact its shares. It was not until

---

[4] Assuming, *arguendo*, DWR's shares had been reclassified by the 1995 shareholder meeting, DWR's harm was only with respect to voting–not assessment of its shares. These are two separate types of harm, and DWR has separate causes of action for each. HCIC admits that all assessment of DWR's shares at the M&I rate occurred within the four-year period prior to when DWR filed its Complaint.

DWR received its first assessment under the new Bylaws that it could bring suit to question their impact, particularly with respect to the financial harm caused by the higher M&I assessment.

Second, both *Aurora Credit* and *United Park City Mines* involve a "one-time event": in *Aurora,* the sale of a corporation's major asset; in *United Park City Mines*, the restructuring of corporate assets and debt. Here, DWR complains of a series of ongoing events beginning in 1977 and continuing to 1999–particularly the assessment process starting in 1995.

While HCIC places great weight on the statement "the statute of limitations on a cause of action begins to run when the plaintiff has sufficient information to put him or her on notice to inquire further if he or she has questions about the defendant's conduct," both *Aurora* and *United Park City Mines* temper this simple rule with layers of complexity. In *Aurora,* this Court found that the rule concerning when statutes of limitations begin to run is subjective–not objective. This Court described the question as whether "a reasonable person would have researched the property's title record." 970 P.2d at 1278-79. And, in *United Park City Mines*, this Court stated that "[a]s a general rule, the statute begins to run upon the happening of the last event necessary to complete the cause of action." 870 P.2d at 890, quoting *Becton Dickinson & Co. v. Reese*, 668 P.2d 1254, 1257 (Utah 1983).

Here, the last event necessary to complete DWR's cause of action was HCIC's reclassification of DWR's shares under the new Bylaws, which occurred in "late 1995"– within the four-year period before DWR filed its suit. And, since that first assessment was received, HCIC has issued DWR inappropriate and illegal assessments in 1996, 1997, 1998, and 1999–all of which were called into question by DWR's Complaint. DWR's claims were not ripe until its shares were reclassified and it was first harmed by HCIC's actions. Further, each inappropriate assessment issued thereafter created a new cause of action, for which a new statute of limitations began to run. Each of these causes of action of necessity calls into question the corporate documents upon which the assessment was based. Further, the harm alleged has continued since the Complaint was filed, and will continue into the future with each annual assessment that is inappropriate and with each denial of voting rights.

VI. DWR'S THIRD CAUSE OF ACTION IS NOT BARRED BY UTAH CODE ANN. § 78-12-26(4)

Utah Code Ann. § 78-12-26(4) (1996) provides that "[a]n action may be brought within three years . . . for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of the state." DWR's Third Cause of Action seeks a declaration that the amendment of HCIC's corporate documents violated Utah Code Ann. § 16-4-24 (1995), where the legislature provided that irrigation companies organized before 1933 when the law was passed may charge other than *pro rata* stock assessments only when their articles of incorporation in place at that time "expressly" so permit. The HCIC Articles of Incorporation in place in 1933 did not meet this standard, and HCIC's attempts thereafter to amend its Articles to allow for other than *pro rata* assessment violate the statute. HCIC makes no real effort to refute this claim, except to: (1) reiterate its incorrect assertion that the only acts DWR complains of are the 1977 and 1987 modification of the HCIC Articles of Incorporation and the 1995 Bylaw changes; (2) claim that DWR can point to no case law "which defines the word 'liability' in § 78-12-26(4) as meaning exclusively 'financial liability'"; and (3) point out that while DWR's Third Cause of Action is for declaratory relief only, its "Sixth Cause of Action seeks money damages for over payment of [M&I] stock assessments–a financial liability."[5]

HCIC's approach is wrong. First, the initial assumption concerning the nature of DWR's action is blatantly incorrect–and HCIC admits as much in its comments concerning the damages DWR seeks. Second, the trial court and HCIC read § 78-12-26(4) in the most tortured fashion possible. The statute requires an action to be brought within three years "for a liability created by the statutes of th[e] state." DWR's Third Cause of Action does not involve a liability created by state statute–it seeks a declaration that "HCIC's purported amendment of its Articles of Incorporation and Bylaws in 1977, 1987, and 1995 to provide for assessment of shares on other than a pro rata basis . . . violates Utah's statutes on assessment of corporate shares and, as such, should be declared void" (Complaint at ¶ 70). Third, while HCIC maintains that DWR cites no authority that the word "liability" in § 78-12-26(4) means exclusively "financial liability," HCIC cites no authority at all concerning § 78-12-26(4). DWR cites several cases in its initial brief to demonstrate that the section does, indeed, refer only to matters of financial liability created by state statute.

Perhaps HCIC gives short shrift to the application of Utah Code Ann. § 78-12-26(4) to DWR's Third Cause of Action because it is convinced that it doesn't really matter whether the trial court properly applied it or not, given that DWR's "claim would fall under th[e] catch-all

---

[5] This is yet another example of HCIC's tacit admittance that DWR's Complaint is not confined to a challenge of the amendment of HCIC's corporate documents only.

provision of 78-12-25(3) (1996)" [a four-year statute of limitations]. (Brief of Appellee at 25). The problem with this, of course, is that the trial court specifically held that § 78-12-26(4) precluded DWR's Third Cause of Action–not § 78-12-25(3).

VII. A NEW CAUSE OF ACTION AROSE IN 1999 WHEN HCIC RECLASSIFIED ALL OF DWR'S SHARES AS MUNICIPAL AND INDUSTRIAL SHARES, AND DWR ALLEGED THIS CAUSE OF ACTION IN ITS COMPLAINT

As demonstrated in painstaking detail earlier in this document, the Complaint challenges the modification of HCIC'S corporate documents from 1977 to 1995, ***and*** the implementation of those amended documents to DWR's HCIC shares from October 1995 to 1999 when the Complaint was filed. The Complaint's Prayer for Relief is crucial. Despite what HCIC claims concerning the relief DWR seeks, the Prayer for Relief states:

> 1. Declare that HCIC's actions requiring DWR to pay "[M&I]" assessments for any of its irrigation use and denying DWR voting rights on certain shares are illegal and of no force or effect.
>
> 2. Declare . . . that the 1977 and 1987 amendments to HCIC's Articles of Incorporation and the 1995 amendment to HCIC's Bylaws are void and of no force or effect to the extent they deny DWR's voting rights or increase its cost of receiving HCIC-delivered water to an amount per share greater than that paid by other HCIC agricultural irrigators.
>
> 3. Declare . . . . that DWR's water use qualifies as an "irrigation use" under HCIC's Bylaws and thus is only susceptible to agricultural assessment, with full voting rights.
>
> 4. Enjoin HCIC from refusing to deliver DWR's water under HCIC shares because DWR has not paid the illegal assessment levied against those shares by HCIC for 1999, and from taking further discriminatory actions harming DWR's HCIC assessments or voting rights.

It is hard to imagine what more DWR would have to plead to give "fair notice" of its intent to contest the legality of the modification of HCIC's corporate documents ***and*** of the implementation of those documents through the assessment process.

HCIC asserts that *Workman v. Brighton, Inc.*, 1999 UT 30, 976 P.2d 1209, demonstrates DWR has no separate cause of action for HCIC's 1999 reclassification of DWR stock. To the contrary, *Workman* says: (1) shareholders in a mutual non-profit company have a cause of action to challenge illegal share assessments, although Workman's attempt failed on the merits; and (2) *Workman*'s challenge would have succeeded had he been able to show an "overriding inequity" in his treatment by the corporation, or that corporate officers had "abused their authority or otherwise systematically used the power of assessment to disproportionately benefit a specific group of [shareholders] to the long-term detriment of the rest." 1999 UT 30, ¶ 15. The 1995, 1996, 1997, and 1998 assessments each created a new cause of action. In 1999 when HCIC "raised the stakes" by disregarding past assessment practice and requiring DWR to pay M&I rates on all DWR shares, the controversy became acute because of the "overriding inequity" of HCIC's actions, which disproportionately benefitted "traditional" farmers to DWR's "long-term detriment" because the assessments would continue indefinitely.

The fact patterns in *Workman* and this case are fundamentally different. Brighton Properties treated Workman **just like all of the other shareholders in the non-profit corporation**, but Workman complained that he should be treated differently. To the contrary, **HCIC treats DWR differently than other shareholders**. HCIC tries to say, in effect, "but we treat DWR the same as the cities and the Power Company–DWR cannot complain." The problem, of course, is DWR is neither a municipality nor an industry, nor does it use any water for M&I purposes. Assuming there is justification for HCIC to assess those entities more than irrigators–such as, for example, that they take water delivery year-round instead of only during the irrigation season–DWR does not fall into that category. DWR takes and uses its water just as the other irrigators do. It costs HCIC no more to deliver water to DWR than to other shareholders. Yet, the arbitrary definition of "irrigation" (apparently tailor-made to exact a subsidy from DWR) incorrectly categorizes DWR as an M&I user. HCIC refers to this as "reasonable" (Brief of Appellee at 30)–which is may be true for those receiving the subsidy. But, to an irrigation stockholder who simply wants fairness, it is not "reasonable." And *Workman* doesn't help HCIC unless HCIC requires ***all*** shareholders to be assessed equally.[6]

To support its argument that a new cause of action did not arise in 1999, HCIC repeats its hackneyed assertions that "such a cause of action was not raised in DWR's . . . Complaint"; that the claim is "entirely new" to HCIC; and that DWR cannot raise the claim for the first time on appeal. DWR is at a loss to see how HCIC could have read the Complaint and missed these assertions.

---

[6] While this Court's opinion is not completely clear on this point–the relevant corporate documents in *Workman* (the articles of incorporation and Workman's purchase agreement) appear to have been written in 1974 and 1986, respectively. The assessment Workman complained of did not occur until 1996, and was based on implementation of the 1974 articles of incorporation. For all of the wrangling between Workman and Brighton, neither Brighton nor this Court believed Workman was precluded by a statute of limitations from bringing his action against the company because of the passage of time between when the articles of incorporation were approved and when they were interpreted to harm Workman.

VIII. DWR'S POSITION ON THE MERITS OF THIS CASE IS STRONG, BUT THE MERITS ARE NOT CURRENTLY BEFORE THE COURT

HCIC asserts DWR has no right to challenge assessments or voting restrictions "where the [HCIC] corporate governance documents specifically allow for the same," that with the "benefits of unified [corporate] action . . . comes the sacrifice of individual autonomy," and when a corporation "makes a legitimate, reasonable business decision, . . . minority shareholders should not be entitled to challenge [it]" (Brief of Appellee at 32).

This assertion is misguided. First, the trial court held that, but for the statute of limitations, DWR "should be allowed to flesh out [its] claims" (Memorandum Decision at 1; R. 262). Second, HCIC did not appeal this ruling. Third, this contention goes to the merits of this case–which are not currently before this Court. DWR will not, at this juncture, debate the merits of its case which are not currently at issue.

This Court has said that by purchasing mutual non-profit irrigation company shares, a shareholder gains, "the right to receive a proportionate share of the water distributed by [the company] . . . in the same manner as all other shareholders." *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 314 (Utah 1993; citation omitted). It has also said, "[a]ssuming a [mutual irrigation company] . . . has violated any enforceable obligations it owes to its shareholders with respect to manner, mode, or quantity of [water] delivery, then those shareholders possess a cause of action . . . ." *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 750 (Utah 1996). Because of HCIC's voting and assessment practices, DWR does not receive its proportionate share of HCIC water in the same manner as other HCIC irrigators. DWR simply wants to be treated the same as other irrigators. It did not give up that right when it acquired HCIC stock. HCIC's assertion that its treatment of DWR results from a "legitimate, reasonable business decision" severely begs the question of fairness, and engenders questions about the propriety of HCIC making ***business*** decisions in a non-profit setting.[7]

CONCLUSION

This Court should overrule the trial court, and reinstate DWR's Complaint in its entirety.

RESPECTFULLY SUBMITTED this 19th day of December, 2000.

JAN GRAHAM, No. 1231
UTAH ATTORNEY GENERAL

MICHAEL M. QUEALY, No. 2667
NORMAN K. JOHNSON, No. 3816
MARTIN B. BUSHMAN, No. 5594

ATTORNEYS FOR APPELLANT
STATE OF UTAH
1594 West North Temple, #300
SALT LAKE CITY UT 84116
(801) 538-7227

---

[7] Assuming the merits are reached, DWR will argue, among other things, that the principles from this Court's holding in *Platt v. Town of Torrey*, 949 P.2d 325 (Utah 1997), apply in the mutual non-profit irrigation company setting. DWR pleaded in its Complaint that the HCIC's assessment must be "based upon the costs of delivering water" (Complaint at ¶ 57), and argued this concept in its Response to HCIC's Motion to Dismiss (Response to Motion to Dismiss at 4) and in oral argument on the Motion (R. 282; 52-53).

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed by United States mail, first class postage prepaid, this 19th day of December, 2000 to the following:

J. Craig Smith
David B. Hartvigsen
Brian C. Cheney
NIELSEN & SENIOR
60 East South Temple, Suite 1100
SALT LAKE CITY UT 84111

Attorneys for Appellee Huntington-Cleveland Irrigation Company

Norman K. Johnson
Assistant Attorney General